

**STATE OF NEW MEXICO
BEFORE THE WATER QUALITY CONTROL COMMISSION**

IN THE MATTER OF:

**PROPOSED AMENDMENTS TO
STANDARDS FOR INTERSTATE AND
INTRASTATE SURFACE WATERS,
20.6.4 NMAC**

No. WQCC 20-51 (R)

**THE NEW MEXICO MINING ASSOCIATION'S
CLOSING ARGUMENT**

In accordance with 20.1.6.304 NMAC and the Hearing Officer's November 9, 2020 Procedural Order, the New Mexico Mining Association (NMMA) hereby respectfully submits its closing argument in this matter arising under the New Mexico Environment Department Surface Water Quality Bureau's Petition to Amend the Standards for Interstate and Intrastate Surface Waters, 20.6.4 NMAC (Triennial Review).

Introduction

The NMMA is a trade organization that represents the mining industry's interests within New Mexico. The NMMA's members include companies that explore, produce, and refine metals, coal and industrial minerals; companies that manufacture and distribute mining and mineral processing equipment and supplies; and companies and individuals engaged in various phases of the mineral industry. The NMMA has eighteen operator members and approximately eighty associate members. Many of the NMMA's members are subject to the regulatory requirements set out in 20.6.4 NMAC and therefore have interests that are directly affected by the New Mexico Environment Department Surface Water Quality Bureau's (Department) proposed changes to these regulations. As set forth fully below, while the NMMA is generally supportive of the Department's proposed changes to 20.6.4 NMAC, a few of the Department's

proposed changes, specifically incorporating a definition of “contaminants of emerging concern” and maintaining the current definition of “toxic pollutants,” create regulatory uncertainty and therefore should be rejected for adoption by the Water Quality Control Commission (Commission).

The NMMA has actively participated in all stages of the Triennial Review proceeding. The NMMA’s participation in the Triennial Review proceeding includes providing initial comments on the Department’s public notice draft of its petition to amend 20.6.4 NMAC in the form of a comment letter submitted to the Department on January 6, 2021, filed with in this proceeding on March 28, 2021. The NMMA then filed its Notice of Intent to Present Technical Testimony in this proceeding on May 3, 2021. Finally, the NMMA actively participated in and presented its technical witness at the hearing in this proceeding, which took place July 13-16 and 21, 2021.

Argument

During the course of its participation in this proceeding, the NMMA had the opportunity to review and provide its comments and opinions of various iterations of the Department’s proposed rule changes to 20.6.4 NMAC. As set forth more fully below, many of the NMMA’s concerns were addressed by the Department’s most recent version of its proposed changes to 20.6.4 NMAC, which are set out in NMED Exhibit 110, and the NMMA is largely supportive of the proposed changes set forth therein.

The Commission should wholly adopt the Department’s proposed changes to 20.6.4.900(I) NMAC. These proposed changes address the NMMA’s concerns regarding the numerical limits used in several tables within 20.6.4.900 NMAC. As NMMA’s technical witness, Mr. David Gratson, explained in his direct written testimony, NMMA Exhibit 1, and

during the hearing on the matter, the Department's initial use of three or more significant figures for numerical limits in 20.6.4.900 NMAC was incongruous with many commercial analytical laboratories' reporting limits and created uncertainty for reported values. The NMMA was concerned that use of more than three significant figures in the numerical standards set forth in 20.6.4.900 NMAC would result in the inability to compare laboratory reported data with the numeric criteria. In response to this concern, the Department proposed additional changes to 20.6.4.900(I) NMAC that require calculated criteria to adhere to the treatment of significant figures and rounding identified in *Standard Methods for the Examination of Water and Wastewater*, latest edition, American public health association. As Mr. Gratson testified at the hearing, this change should be adopted to provide certainty for laboratories that are calculating and reporting values.

The Commission should reject the proposed amendments to 20.6.4.6 NMAC and 20.6.4.7(C)(4) NMAC offered by Amigos Bravos. They are superfluous and create regulatory uncertainty. Unlike the Department's proposed changes,¹ Amigos Bravos' proposed amendments to 20.6.4.6(C) and 20.6.4.7(C)(4) NMAC, as set forth in AB Ex. 10, create confusion and are unnecessary. The Department's proposed 20.6.4.6(C) NMAC regulation provides a concise objective of the surface water quality regulations concerning climate change. Amigos Bravos' proposed revisions to this provision are rambling, redundant and uncalled for as they do not state cogent objectives for the surface water regulations. Amigos Bravos' proposed revisions to 20.6.4.7(C)(4) NMAC are similarly flawed and fail to offer anything to the Department's proposed definition. There is great potential for confusion and no benefit to adopting Amigos

¹ As the NMMA indicated in its opening statement, the NMMA does not oppose the Department's proposed changes to 20.6.4.6 and 20.6.4.7(C)(4) NMAC as set forth in NMED Exhibit 110. The NMMA notes that the testimony presented by the Department's witness, Shelly Lemon, during the hearing indicates that the proposed changes may be unnecessary, as there are no substantive standards or requirements or processes set forth in the 20.6.4 regulations, including in NMED Exhibit 110, that make use of the term "climate change" or would be affected by the term.

Bravos' proposed changes to 20.6.4.6(C) and 20.6.4.7(C)(4) NMAC. Therefore, the Commission should reject these proposed revisions.

The Department's proposed definition of "contaminants of emerging concern," as set out in 20.6.4.7(C)(7) NMAC, and its proposed use of that definition in 20.6.4.13(F)(1) NMAC, is vague and rife with uncertainty for the regulators and regulated community and should be rejected by the Commission. As set forth in NMED Exhibit 110, the Department proposes to define, "contaminants of emerging concern," to essentially mean "generally chemical compounds that, although suspected to potentially have impacts, do not have regulatory standards, are not routinely monitored for, and the concentrations to which negative impacts are observed have not been fully studied." This unscientific definition by its own terms is without standard, largely turns on mere speculation, fails to provide meaningful guideposts for compliance, and is highly problematic given how it is used in the Department's proposed amendments to 20.6.4.13(F)(1) NMAC. That provision, as proposed, would require in relevant part that "surface waters shall be free of toxic pollutants, *including but not limited to contaminants of emerging concern*" (Emphasis added.) As demonstrated by Triad National Security (Triad) and the Department of Energy's (DOE) witness, David Bryan Dail, this provision is inherently problematic as there is no way for the regulated community or the regulators to know what they would be monitoring for, the levels they would be required to monitor, or when they would have an exceedance of a limitation. *See* DOE/Triad Exhibit 5, pp. 6-7. The NMMA urges the Commission to reject these amendments as they only serve to create significant uncertainty, expense and compliance-related risks for both the regulated community and the Department.

The Commission should adopt DOE/Triad's proposed amendments to the definition of "toxic pollutant," as set forth in DOE/Triad Exhibit 1, as they address contaminants of emerging concern and provide clarity about the pollutants that are subject to the regulatory requirements of the rule. DOE/Triad's proposed definition of "toxic pollutant" includes reference to a specific and clear list of pollutants that are provided by the Environmental Protection Agency Administrator under Section 307(a) of the Clean Water Act as toxic and provides the Commission with the ability to list additional pollutants it considers toxic on an as needed basis. This proposed definition would therefore allow the Commission, after appropriate process, to adopt and list any contaminants of emerging concern that are not currently listed by the EPA that are of concern to New Mexico. DOE/Triad's proposed definition would create an ascertainable list of toxic pollutants, would facilitate the identification of contaminants of emerging concern, and would create clarity for the regulated community and the Department. Additionally, DOE/Triad's proposed definition of "toxic pollutant" is consistent with the Commission's ground water regulations at 20.6.2.7(T)(2) NMAC. The current definition of "toxic pollutant" set forth in the surface water regulations at 20.6.4.7(T)(2) NMAC should therefore be amended as it does not provide clarity regarding the pollutants the Department will require dischargers to address and treat as toxic.

Conclusion

As discussed herein, the Commission should adopt the Department's proposed changes to 20.6.4 NMAC as set out in NMED Exhibit 110, except those relating to "contaminants of emerging concern," 20.6.4.7(C)(7) NMAC and 20.6.4.13(F)(1) NMAC as those amendments are vague and will create unnecessary regulatory uncertainty. To create more certainty, the Commission should adopt Triad/DOE's proposed revisions to the current definition of "toxic

pollutant” in DOE/Triad Exhibit 1 (20.6.4.7(T)(2) NMAC) as it sets forth a clear list of toxic pollutants and includes flexibility for the Commission to continually amend that list. Finally, for the reasons stated herein, the Commission should reject Amigos Bravos’ proposed definition and use of the term “climate change.”

The NMMA appreciates the opportunity to provide this closing argument.

Respectfully Submitted,

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Certificate of Service

I hereby certify that on September 24, 2021 a copy of the foregoing was filed with the WQCC hearing clerk via electronic mail to:

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